

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

UNITED STATES OF AMERICA,

Plaintiff, Appellant,

vs.

BHAGAT SINGH THIND,

Defendant, Respondent.

BRIEF OF RESPONDENT.

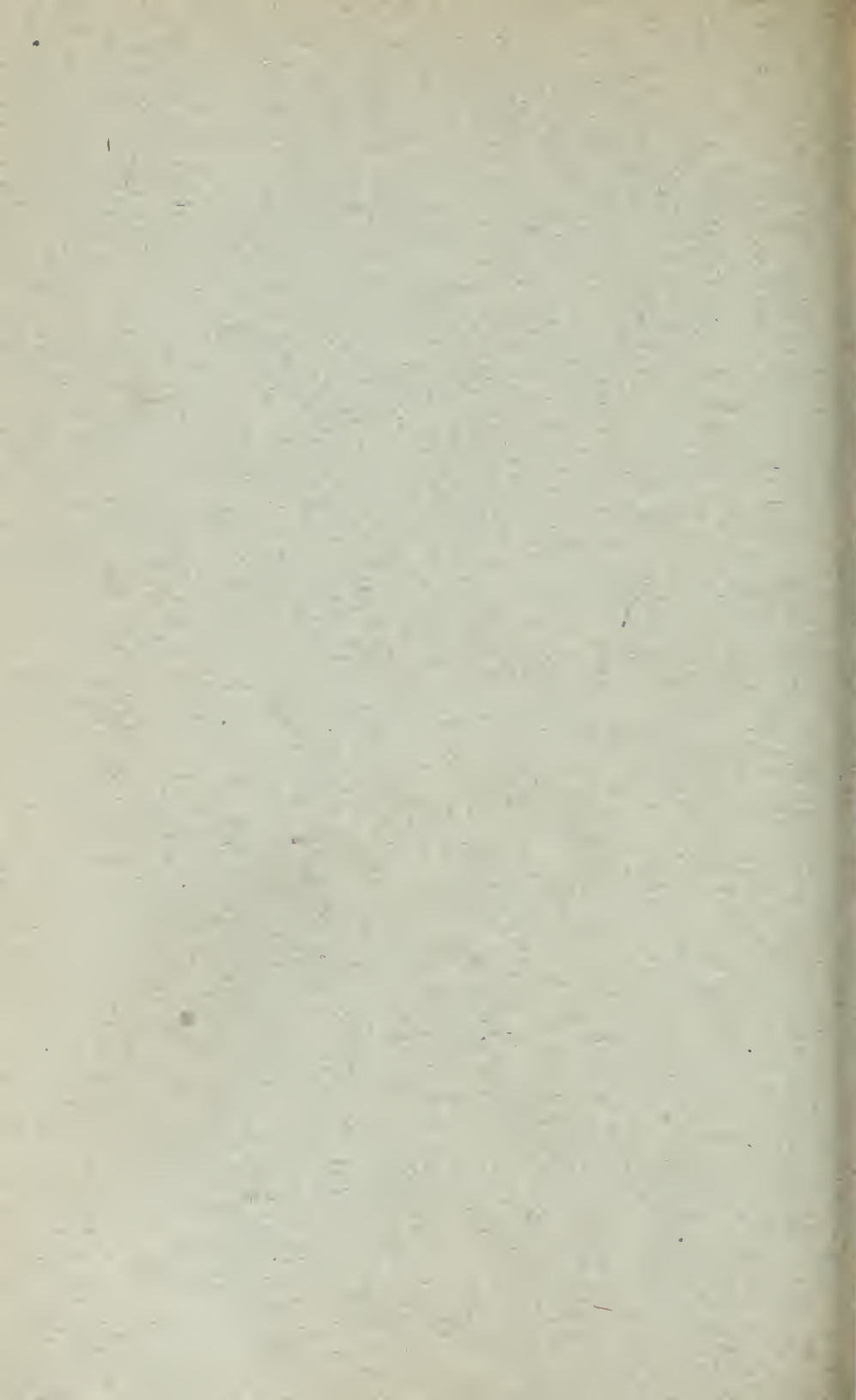
Upon Appeal from the United States Court
For the District of Oregon.

THOMAS MANNIX, *Attorney for Respondent.*

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F. D. MONGKTON



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STATEMENT.

(1) As this case comes up on demurrer and as I believe Judge Wolverton has correctly stated both the facts and law, for the convenience of the Court I am going to print here the decision of Judge Wolverton, reported in 268 Fed. 683:

“The applicant is a high-caste Hindu, born in Amritsar, Punjab, in the northwestern part of India. He is 28 years of age, and was admitted into this country on July 4, 1913, at Seattle, Wash. He entered the army, and served therein for six months at Camp Lewis, and was accord-

ed an honorable discharge; his character being designated by the officer granting the discharge as "excellent." He was acting sergeant at the time of his discharge.

The testimony in the case tends to show that, since his entry into this country, the applicant's deportment has been that of a good citizen, attached to the Constitution of the United States, unless it be that his alleged connection with what is known as the Gadhr party or Gadhr Press, a publication put out in San Francisco, and the defendant Bhagwan Singh and others, prosecuted in the federal court in San Francisco for a conspiracy to violate the neutrality laws of this country, has rendered him an undesirable citizen. He was on friendly terms with Bhagwan Singh, Ram Chandra, and others who had to do with the Gadhr Press, and, after Bhagwan Singh's conviction, while the latter was on his way to the penitentiary at McNeil Island, met him at Portland, at the depot, and subsequently visited him at the penitentiary three or four times.

He stoutly denies, however, that he was in any way connected with the alleged propaganda of the Gadhr Press to violate the neutrality laws of this country, or that he was in sympathy with such a course. He frankly admits, nevertheless, that he is an advocate of the principle of India for the Indians, and would like to see India rid of British rule, but not that he favors an armed revolution for the accomplishment of this purpose. Obviously, he has modified somewhat his views on the subject, and now professes a genuine affection for the Constitution, laws, customs, and privileges of this country.

Were his allegiance to the laws and customs of this country dependent upon his protestations alone, I should not be inclined to give them credence. They are, however, strongly corroborated by disinterested citizens, who are most favorably impressed with his deportment, and manifestly believe in his attachment to the principles of this government. I have not attempted to analyze the testimony critically, because of its length, but, from a careful survey of it, I am impressed that his deportment here entitled him to become a citizen, unless it be that he is debarred from citizenship under the naturalization and immigration laws of Congress.

I am not disposed to discuss the question as one of first impression whether a high-class Hindu, coming from Punjab, is ethnologically a white person, within the meaning of Section 2169 of the Revised Statutes, as amended (Comp. St. sec. 4358). I am content to rest my decision of the question upon a line of cases of which *In re Mohan Singh* (D. C.) 257 Fed. 209, *In re Halladjian* (C. C.) 174 Fed. 834, and *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660, are illustrative. I am aware that there are decisions to the contrary, but am impressed that they are not in line with the greater weight of authority.

A crucial question presented is whether the third section of the Immigration Act of Congress of February 5, 1917 (39 Stat. 874, 875, (Comp. St. 1918, Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 4289 $\frac{1}{4}$ b), operates as a repeal of section 2169, R. S., in so far as it embraces the words "white persons." Section 3 excludes Hindus from admission into this country by territorial

delimitations. The act became effective May 1, 1917. Subsequently thereto, it became unlawful for a Hindu to enter the United States, and it may be confidently affirmed that no person who entered the United States unlawfully can be admitted to citizenship therein.

Bhagat Singh did not enter unlawfully. He came at a time when he had a right to enter, and was permitted to enter in pursuance of law. The act in question does not purport to disturb his present domicile here, nor does it impose any further duty upon him by which he may maintain such a domicile. Neither does it require of him that he shall depart the country. Furthermore, I find nothing in the act that evinces an intentment that it should operate retrospectively; that is, to render his lawful entry presently unlawful. We may inquire, then, respecting the status of Hindus lawfully domiciled in this country. Shall they remain here as they please, without the privilege of becoming citizens, or shall they be deported whence they came? If the latter, how and when. As to these questions, the law is silent, unless section 2169 and the naturalization laws are still applicable.

Repeals by implication are not favored, and, unless there is manifest repugnancy between the latter and the former act, the former must remain operative. The argument is that, as Congress eliminated the words "white persons" from the Immigration Act, the act in question, it must be inferred that it intended to eliminate these words also from section 2169, and thus to amend that section accordingly. This does not necessarily follow. Congress was dealing with the subject of

immigration, and not naturalization, and it may well be that Congress designed thenceforth to exclude Hindus from entry into the United States, and still permit such as were domiciled here the privilege of being naturalized. In this light, I see no repugnancy between the act and section 2169 and other naturalization regulations.

I see no analogy in this act to the Chinese Exclusion Act. To illustrate, by the sixth section of the Act of May 5, 1892 (27 Stat. 25, (Comp. St. sec. 4320)), it was made the duty of Chinese laborers within the limits of the United States at the time of the passage of the act, and who were entitled to remain therein, to apply to the collector of internal revenue of their respective districts, within one year, for certificates of residence; and it was further provided that any Chinese laborer who neglected or refused to comply with the provisions of the act, or who, after one year from its passage, was found within the United States without such certificate, should be deemed and adjudged to be unlawfully therein, and should be deported accordingly. This statute has been sustained, and the courts have held that the United States can forbid aliens coming within their boundaries and expel them from their territory. *Wong Wing v. United States*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

So it has been held that a certificate issued to a Chinese laborer, under the fourth and fifth sections of the Act of May 6, 1882 (22 Stat. 58), as amended July 5, 1884 (28 Stat. 115), conferred upon him no right to return to the United States of which he could not be deprived by a

subsequent act of Congress. *Chae Chan Ping v. United States*, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. This case is illustrative.

The present act, however, does not deal with the Hindus and other races without the delimitations other than to debar their further admission into this country. It does not require such as are here to depart, and there being no manifest repugnancy between this and the naturalization laws, it must be concluded that Bhagat Singh is entitled to his naturalization."

It would seem that a majority of the courts are in accord with the foregoing opinion.

(2) In *United States v. Balsara* (Second Cir.), 180 Fed. 694, Circuit Judge Ward, in the case of a Parsee, said:

On the other hand, counsel for Balsara insist that Congress intended by the words "free white persons" to confer the privilege of naturalization upon members of the white or Caucasian race only. This we think the right conclusion and the one supported by the great weight of authority. In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104; In re Saito (C. C.), 62 Fed. 126; In re Camille (C. C.), 6 Fed. 256; Matter of San C. Po., 7 Misc. Rep. 471, 28 N. Y. Supp. 383; In re Buntaro Kumagai (D. C.), 163 Fed. 922; In re Knight (D. C.), 171 Fed. 297; In re Najour (C. C.), 174 Fed. 735; In re Halladjian (C. C.), 174 Fed. 834."

In *re Mohan Singh*, 257 Fed. 209, District Judge Bledsoe in naturalizing a Hindu said:

"Congress intended by the words 'free white

persons' to confer the privilege of naturalization upon members of the white or Caucasian race only. * * * * Modern ethnologists use the terms 'white' and 'Caucasian' synonymously und interchangeably. Seemingly the preponderance of respectable opinion includes the Hindus of India as members of the Aryan branch or stock of the so-called Caucasian or white race. * * * * I am advised by counsel for petitioner herein and the statement is not challenged by the Government, that Hindus have been admitted to citizenship in the Southern District of Georgia, the Southern District of New York, the Northern District of California and the Eastern District of Washington by the courts of the United States and by the Superior Court of California in both San Francisco and Los Angeles."

In *re Mozumdar*, 207 Fed. 115, District Judge Rudkin, in granting naturalization to a Hindu in the District Court of the United States for the Eastern District of Washington, said:

"But whatever the original intent may have been, it is now settled by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

In *Dow v. United States*, 226 Fed. 145, (Fourth Cir.), involving the naturalization of a Syrian, it is stated in the head note:

"The term 'white persons,' as used in Rev. St. Sec. 2169 (Naturalization Act, March 26, 1790, c. 3, 1 Stat. 103, as amended by Act Feb. 18, 1875, c. 80, sec. 1, 18 Stat. 318 (Comp. St.

1913, sec. 4358), *authorizing the naturalization of aliens being 'free white persons,' is not to be construed according to its import in 1790, and, in view of the course of legislative discussion and enactment, includes a Syrian.*"

In the same case the lower court held that the meaning of "free white persons" in the statute was free white persons of European habitancy or descent, but the Circuit Court of Appeals on review did not take this view of the statute.

In the case of *In re Mudarri*, 176 Fed. 465, Circuit Judge Lowell naturalized a Syrian on the ground that he was a member of the Caucasian or white race and the same judge in the *Halladjin* case, 174 Fed. 834, naturalized an Armenian for the same reason.

District Judge Newman in Georgia, in the case of *In re Najour*, 174 Fed. 735, naturalized a Syrian on the ground that he was white or a Caucasian.

Judge Wolverton, in *In re Ellis*, 179 Fed. 1002, also naturalized a Syrian on the ground that he was a Caucasian or white person. There Judge Wolverton said:

"The most reasonable inference would be that the word 'white,' ethnologically speaking, was intended to be applied in its popular sense to denote at least the members of the white or Caucasian race of people."

Other courts, for instance in *In re Singh*, 246 Fed. 496, and the lower court opinion in *In re Dow*, 211 Fed. 486 and 213 Fed. 355, which cases were re-

versed by the Circuit Court of Appeals, in 226 Fed. 145, go on the theory that the words "free white persons" should be used in a restrictive and geographical sense.

It is not clear in the present case just what the Government's theory is. It seems to rely largely on the reasoning of the overruled cases above, that is *In re Dow*, 211 Fed. 486 and 213 Fed. 355.

It will be seen from the foregoing decision that the weight of authority is in favor of the admission of Hindus to citizenship.

(2) A great majority of the cases hold that the term "free white persons" relates to members of the Caucasian race generally and is not a matter of geography. The cases relied upon by the Government would make race a matter of geography and would relegate the meaning of the statute to its supposed meaning on March 26, 1790, when it was enacted. At that time the American people were composed almost entirely of English, Irish, Scotch, Germans and Swedes. Since that time, however, the complexion of the American race has changed by immigration, and citizenship has been extended to all sorts of races of white persons, including Jews, who are certainly an Asiatic race, and also Syrians and Armenians, so that no geographical classification is possible for one does not lose his race by changing his habitat. Race is a matter of blood and descent—not a matter of residence.

Whatever may have been the origin of the word

“Caucasian,” and I think it was originated by a German named Blumenbach, who applied the term to some race of people who lived near the Caucasus Mountains and who were supposed by him to be the highest type of the white race; the word has by usage received a well-defined meaning so that every schoolboy in America understands that the word “Caucasian” applies to members of the white race, irrespective of geography. As already pointed out, the naturalization statute has not been construed by the more reasonable authorities in any geographical sense, but in a racial sense.

The question resolves itself into whether a Hindu is a member of the white or Caucasian race. The greater number of legal authorities answer the question in the affirmative.

Historically, it appears that in pre-historic times a certain white race of people called Aryans lived in Central Asia and sometime about the year 2000 B. C. a part of this Aryan race went southward to India and conquered the Dravidian natives, who were a race somewhat akin to the aboriginal Australians, and who were entirely distinct from their Aryan conquerors. This fact is attested to by all the histories dealing with the Aryan race and with India. See *Historians' Hist. World*, Vol. 2, pages 475, 482

Apart from history comes the proof of philology. It has been discovered by persons versed in the genesis of languages, that practically all the modern

European languages and the Sanskrit language have a common Aryan root and this is circumstantial evidence of the very highest order, for if the Hindu speaks a language similar to the European languages, all having a common root, it proves that back in the mists of pre-historic times the present Hindu race must have been associated with the ancestors of the present European race in one community or nation where a common language was used, namely, the parent language of the Aryan race. If there was an Aryan language, which is proved by philology, there must have been an Aryan race. The language could not exist without the race. One proves the existence of the other. See *Ency. Britannica*, Vol. 2, page 115; Huxley, *Man's Place in Nature*, 272; Freeman, *Race and Language*, Harvard Classics, Vol. 28, page 235.

Many scientists have attempted to show that similarity of language does not prove similarity of race. Of course this is true in some cases, as, for instance, the American negro, although speaking the English language, could not be classed as a Caucasian. But we know that the American negro belonged to a subject race and acquired the English language from those who subjected him, while in the case of the Hindu history shows that he has never been subjected by any race of conquerors who materially changed his language up to the time when Lord Clive in the battle of Plassey won India for the British Empire. So that in the case of the Hindu philology connected with the historical facts of the case reasonably establishes racial identity between the Hindu and the white European.

From the viewpoint of ethnology, that is, taking the Hindu and comparing his physical structure with that of the white Englishman or Scotchman, we find the same physical traits. If a Hindu of the Aryan race was light in color he would pass in London for an Englishman, so far as his appearance is concerned.

We all know that a hot sun will blacken any race. We find the Finns who live in the most northern part of Europe to be the lightest-colored in Europe, although they are supposed to be Mongolians, and as we go further south in Europe we find the races become darker until we finally find the Moor, of whom Iago spoke.

All the conflicting views of the ethnologists and philologists are very interesting and very confusing. Lawyers probably are better acquainted with the value of circumstantial evidence than these ethnologists, philologists, or college professors. At least they must make a more practical application of the rules of circumstantial evidence, and as a matter of circumstantial evidence or induction, taking the Hindu from a historical, philological and ethnological point of view there is no reasonable doubt about his identity as a white man, a little sunburned, it is true, but nevertheless a white man. In all cases of circumstantial evidence it is a case of weighing probability against probability and accepting the more reasonable hypothesis.

The cases cited above contain most all the philological and ethnological arguments on this subject.

Probably Huxley and Max Mueller, together with the Encyclopedia Britannica throw the most light on the subject, and it is not my purpose to lengthen this brief further on this phase of the case.

This particular Hindu is a high-class man in every respect, a veteran of the late war and a volunteer, who received high commendation from his superior officers for his distinguished services. His personal desirability is therefore apparent and as a general proposition a man who fights for the flag should be entitled to come under the flag. His love for America is evidenced by his conduct. To reverse this case would result in the disenfranchisement of a great number of Hindus in all parts of the Pacific Coast and other parts of the United States.

Judge Wolverton, Judge Rudkin and Judge Bledsoe, all under the jurisdiction of the Circuit Court of Appeals of this circuit, have already admitted Hindus to citizenship after an exhaustive study of the subject, and while this may be an argument *ad hominem*, nevertheless, their opinions are entitled to the most respectful consideration.

(3) As to the Immigration Act touching Hindus, the Naturalization Act and the Immigration Act relate to two entirely different subjects and for that reason alone there could be no amendment to the Naturalization Act by implication.

These two statutes are not *in pari materia*. Statutes are *in pari materia* which relate to the

same subject matter. When statutes are *in pari materia*, they are to be construed together, but when they are not *in pari materia*, they do not relate to the same subject matter and cannot be construed together. (See Words and Phrases, Vol. 4, page 3478.)

In *United States v. Claflin*, 97 U. S. 546, 24 L. Ed. 1082, it is held that in order to repeal a statute by implication, the subject of the statutes must be the same, and even if the statutes are *in pari materia*, there shall be no repeal in the absence of express words, unless the implication of repeal is necessary.

Wilmot v. Mudge, 103 U. S. 217; 26 L. Ed. 536.

Repeals of statutes by implication are not favored and are never admitted where the former can stand with the new act, but only where there is a positive repugnancy between the statutes, or the latter is plainly intended as a substitute for the former.

U. S. v. 67 Pack, of Dry Goods, 17 How. 85; 15 L. Ed. 54.

Washington v. Miller, 235 U. S. 422; 59 L. Ed. 295.

See also to the same point: *Supervisors v. Laekawanna*, 93 U. S. 619; *Arthur v. Homer*, 96 U. S. 137; *Movins v. Arthur*, 95 U. S. 144.

It is further held that a later act will not be held to repeal a prior act unless there is a positive

repugnancy between the provisions of the new law and the old, and even then only to the extent of such repugnancy.

U. S. v. Mathews, 173 U. S. 381; 43 L. Ed. 738.

Section 2169 Revised Statutes reads as follows:

“The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent.”

According to the contention of counsel the act to regulate the immigration of aliens to and the residence of aliens in the United States enacted in 1917 would repeal and amend this act so that it would contain the provision excluding free white persons from the different countries in Asia. Such a contention in the view of the foregoing authorities cannot be sustained.

The Immigration Act prohibits the immigration of idiots, imbeciles, insane persons, drunkards, paupers, vagrants and people suffering from tuberculosis and other diseases and also prohibits the immigration of Asiatics. Let us suppose for instance that a person afflicted with tuberculosis came to this country in 1910, or any other year prior to 1917 and applied for naturalization, would the fact that he belonged to a class that could not be admitted into the United States because of the Act of 1917 prevent him from becoming naturalized? The mere statement of the proposition shows its absurdity.

There is no provision in the Naturalization Act itself to prevent persons afflicted with tuberculosis, or epilepsy, or even chronic alcoholism, from becoming American citizens, and the fact that this class of persons are precluded from coming into the United States by the law of 1917 would not prevent persons of these classes from becoming citizens of the United States under the Naturalization Laws, if they came to the United States prior to 1917, and were otherwise qualified.

The same reasoning applies to Hindus. If a Hindu came to the United States prior to 1917 he would at least be in the same category, as far as the Immigration Law is concerned, with a consumptive person. Speaking figuratively he would be afflicted with the disease which might be termed "Hindooism," which disease would keep him out of the country under the law of 1917, but which would not preclude him from becoming a citizen of the United States if he came into the country before that time.

There is nothing in the Immigration Act which in any way impinges upon the Naturalization Act. If Congress had intended to interfere with the citizenship of Hindus, they would have said so. There is no Hindu naturalization exclusion act and we cannot create one by implication merely for the purpose of denying Bhagat Singh of citizenship. The Immigration Act of 1917 only affects Hindus who attempt to come to this country after that time. If

a Hindu or a consumptive, or a drunkard, or any of the other classes enumerated in the act have attempted to enter the United States since 1917, in violation of the act they may be deported or otherwise punished, as provided by the act. Any person who comes to the United States in violation of the Immigration Act of 1917, commits a crime against the United States and obviously could not become a citizen for that reason.

Therefore, the naturalization of aliens who came to the United States prior to 1917 is not affected by the Immigration Act. The purpose of the Immigration Act was prospective and not retroactive. A law cannot be presumed to be retroactive and there is nothing in the Immigration Act which makes it retroactive. In any of the naturalization cases heretofore tried, so far as known, this point has not been raised. We suppose for the reason that it is too plain for argument that neither the Naturalization Act or the Immigration Act in any way interfere with each other, nor is either act affected or modified by the other. It follows from this that Section 2169 is in full force and effect and if it is in full force and effect the Immigration Statute cannot be considered in connection therewith.

We therefore respectfully petition your Honorable Court for the affirmance of District Judge Wolverton's judgment, granting citizenship to your respondent.

Respectfully submitted,

THOMAS MANNIX,

Counsel for Respondent.

Sept, 26, 1921.

